No. 80-896

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD J. AVNET,

Petitioner,

v.

KATARINA AVNET,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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RICHARD J. AVNET,

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QUESTION PRESENTED

Is it not a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution to apply a different standard in modifying a father's child custody rights as distinguished from a mother's child custody rights?

To The Honorable, The Justices of the Supreme Court of the United States.

The Petitioner, Richard J. Avnet, respectfully prays that a writ of certiorari be granted to review the final judgment of the Court of Appeals of Maryland, which was entered in the above case on September 4, 1980.

CITATION TO OPINION BELOW

The trial court of original jurisdiction, The Circuit Court for Howard County in Maryland, delivered an opinion in this case, the pertinent portion of which is quoted in the opinion of the Court of Special Appeals of Maryland, the next appellate Court to which an appeal was taken, where there was an affirmance. The opinion is unreported; a copy of the opinion is included (App.1). The Court of Appeals of Maryland, the next appellate court, which is the highest Court of the State of Maryland, denied a petition for writ of certiorari. The Order is included (App. II).

Attached also is a copy of that portion of the Separation Agreement which presents the visitation schedule (App. III).

JURISDICTION

The Petitioner is allowed 90 days from the date of entry of judgment within which to petition the Court for certiorari 28 *USCA* § 2101(C). The Petition is therefore in time.

The applicable portions of the statutory provision under which the jurisdiction of this Court is invoked is 28 *USCA* § 1257(3) which reads as follows:

> "(3) By writ of certiorari . . . where any . . . right . . . is specially set up or claimed under the Constitution.".

The remedies available to the Petitioner in the state court have been exhausted, since all appellate accesses have been used.

The issue of federal constitutional law was raised in the Court of Appeals of Maryland. A copy of that portion of the Petition for Certiorari to that court is included (App. IV). The Court of Appeals did not comment on the constitutional issue. That issue is the denial vel non of the equal protection of the laws under the 14th Amendment. The applicable portion of that Amendment reads:

> ". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The Petitioner, a devoted father, had marital difficulties in August 1977. The Petitioner's wife told him she was leaving, possibly leaving the state or country with their only child. The Petitioner filed for temporary custody. Mrs. Avnet then absconded from the state with the child, returning only after being ordered by the court to do so. The parties subsequently entered into a Separation Agreement and later a Consent Decree which incorporated the Consent Decree and which spelled out, inter alia, that the parties shall have joint custody of the child (later defined as shared custody), and that the child shall reside with the mother but with liberal visitation rights in the father including the right to visit with the child weekly and to have the child with him over night every other week-end and to have the child with him every other school vacation period and every other holiday and for a period of 6 weeks during the summer on an overnight basis. The parties were subsequently divorced.

Although separated after the breakup of the marriage, the father-son relationship continued to be very close and

the child prospered under the provisions of the Consent Decree.

Approximately one year after the Consent Decree was signed, the Respondent, Katarina Avnet, filed a Petition to set aside the Consent Decree, and on August 8, 1979, the chancellor denied the petition but modified the visitation provisions provided for in the Separation agreement and the Consent Decree and eliminated 139 father-son visits per year.

REASONS FOR GRANTING THE WRIT

I.

IT IS A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION TO APPLY A DIFFERENT STANDARD IN MODIFYING A FATHER'S CUSTODY RIGHTS AS DISTINGUISHED FROM THE MOTHER'S CUSTODY RIGHTS.

In this case there is joint custody or shared custody. Visitation rights are a part and parcel of custody *Grubbs v. Dowse,* 226 Ga. 763, 177 S.E.2d 237; *Boyles v. Boyles,* 14 Ill. App. 3rd 602, 302 N.E.2d 199.

The standard applicable to a petition for a change of custody is an affirmative showing of change of circumstances which adversely affect the welfare of the child. *Vernon v. Vernon,* 30 Md. App. 564, 354 A.2d 222; *Sartoph v. Sartoph,* 31 Md. App. 58, 354, A.2d 467.

Basically, the father-petitioner is seeking to preserve the ingredients of his shared custody rights, namely, the visitation privileges originally granted to him by the Separation Agreement and by the Consent Decree. Any diminution in these rights by a Court must be guided by law and that law dictates that the mother-respondent must have proved a substantial change in circumstances adverse to the child's welfare. The father-petitioner would

have had to prove such if he sought to deprive her of her custodial rights or a lessening of her custodial privileges. It was a denial of the equal protection of the laws guarantee to provide a different standard for the father-petitioner than for the mother-respondent in the consideration of custodial or visitation rights.

Currently, it is being charged that state courts exhibit prejudice against fathers in custody cases. This has become a focal point in the press and other media and in the minds of the general public. In *Avnet* a sound issue of constitutional denial is raised in this area of discussion and it would seem fitting and proper that this court should entertain a hearing in this case, in the public interest.

II.

THE MODIFIED VISITATION SCHEDULE WAS NOT JUSTIFIED BY THE EVIDENCE PRODUCED.

At the trial, the Petitioner, as well as Petitioner's other witnesses, testified that his child prospered under the previous arrangements which was written into the Separation Agreement and in the Consent Decree. The Petitioner produced the report of the child's pediatrician which stated the child was healthy and happy. The wife agreed to the submission of the report and its contents into evidence and agreed to its conclusion and opinion. The record is replete, without refutation, that the Petitioner, and the child had a close father-son relationship.

There is nothing in the evidence which establishes that any significant change occurred adversely affecting the welfare of the child. Thus, there is nothing in the record to warrant a change of visitation by the father, if the same rule is employed as in a petition to change custody, namely a change of circumstances adverse to the welfare of the child. It is submitted that such should have been the

standard utilized by the lower Court and by the appellate courts in the *Avnet* case. No such standard was applied.

The net effect of the modification of the Consent Decree is to attenuate the role of the father and to enlarge the role of the mother in the upbringing of the child. This was done even though the mother already had the child living with her. It is self-apparent that this will make a significant change in the relationship of father and son to the detriment of both.

The trial Judge modified the visitation schedule provided for in the Consent Decree after finding it *may* not be in the best interest of the child although there was no showing that there was a substantial change in circumstances which adversely affected the welfare of the child. At best, this is an unsure and uncertain comment. It is a probe and not a discovery of fact. It cannot be graced with the characterization of a finding fact. Because it has not factual basis to support it, it is fatally inadequate; and the modification of the visitation schedule should be reversed.

Inter alia, the lower Court modified the prior Consent Decree as follows with regard to visitation:

a. No provision is made for the petitioner to visit with the child during the week at all;

b. Petitioner's six week summer visitation is diluted by allowing the mother to have the child every other weekend overnight up to a maximum of 4 weekends of the 6 week summer visit with the Petitioner;

c. Petitioner's right to have the child with him on every other school vacation period has been diminished by his having the child for only one day of each such school vacation period.

These changes will add up to a total minimum loss to Petitioner of approximately 47 overnight visits and 92 regular visits for a total of 139 visits per year.

Society has changed its view with regard to the father's role in the rearing of the family. Whereas in earlier times the Courts considered the father as the natural custodian of a child, this was changed in the latter 19th century to favor the mother. However, with women acquiring greater economic, social and political independence in American society, radical changes have occurred in the family unit. Greater need has fallen on the father to assist in the daily chores of the home and in the daily duties related to the upbringing of the children. Some Courts are responding to this significant social change. It is reflected in the Courts by its rulings which give the father more rights in respect to the upbringing of a child of a broken marriage. If outright custody is not awarded to the father, joint custody, or shared custody, as exists in the *Avnet* case, is decreed more and more often. The recent enactment of the California Law of Joint Custody discloses it to be the public policy of that State to assure minor children of frequent contact with *both* parents and to encourage parents to share the rights and responsibilities of child-rearing in order to effectuate that policy. (Section 1600 & 1600.5 *California Civil Code.*)

Medical and social writers also underscore the importance of the post-divorce structure to establish a responsible relationship between the parents and child. The more time allowed a parent to be with the child, the stronger the bond becomes. The less time so allowed produces the opposite result, not because the parent does not care, but because he wished to avoid the pain encountered by his loss. (See discussion in "Joint Custody: A Sociological Study." by Dr. J. B. Grief. TRIAL MAGAZINE, "Association of Trial Lawyers of America", Vol. 15, No. 5 (May, 1979) pg. 32.)

In a child of 3 years the saying "Out of Sight, out of Mind" is especially applicable. If a child of these tender years does not see his father for a few days, he feels that he has lost him. Time to a child works differently than to an adult. A few weeks is equivalent to many months and more in his mind and life. It is not infrequent that the every other weekend visit becomes every third or fourth week due to illness of the child or of the father or for other unavoidable reasons.

Social studies emphasize how important it is to a male child to have the companionship of his father. (See "Children and Adolescents" by Boyd R. McCandless at pages 107-111, published by HOLT, RINEHART AND WINSTON, 383 Madison Avenue, New York, New York (1963).)

Under these circumstances, it is difficult to comprehend how eliminating a significant part of the Petitioner's visitation schedule is in the best interest of the child.

CONCLUSION

For the foregoing reasons, this writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

UNREPORTED

In The Court of Special Appeals of Maryland

September Term, 1979

No. 1207

Richard J. Avnet

v.

Katarina Avnet

Morton, Thompson, Couch, Judges

Per Curiam

Filed: May 20, 1980

This is an appeal from an order entered in the Circuit Court for Howard County by Judge Guy J. Cicone under which the appellee, Katarina Avnet, was granted a divorce a vinculo matrimonii from the appellant, Richard J. Avnet. The order also provided for shared custody of the

minor child of the parties, ordered child support to the appellee and set forth a child visitation schedule for the parties.

In this appeal the appellant contends that the chancellor erred in setting the visitation schedule because it was not justified by the evidence.

The parties were married on October 12, 1969, and have one child, Evan Avnet, who was born on August 30, 1976.

In justification of his decision and order the chancellor filed a twenty-one page opinion. Because we agree completely with the chancellor's conclusions concerning the child visitation rights of the parties, we set forth below and adopt as an opinion of this Court that segment of his opinion which supports the visitation arrangement he ordered.

"CUSTODY AND VISITATION

> The central issue in this case, and in fact the problem which gave rise to the first round of litigation, is the custody of the minor child, Evan Avnet. The Separation Agreement provides for joint custody, but also sets forth a complex and nearly indecipherable visitation schedule which may not be in the best interests of the child. While the Court has stated that the Separation Agreement as a negotiated document must be upheld, it does have the power to modify this Agreement and will do so in an attempt to determine a custody and visitation arrangement that will be satisfactory to the parties and beneficial to the minor child.
>
> Both spouses provided testimony as to their relationship with Evan Avnet, with the husband's case on this issue including expert testimony from a psychologist at Morgan State College. The Court is aware of the abolition in Maryland of the traditional maternal preference in child custody matters. Art. 72A Sec. 1 and see *McAndrew v. McAndrew*, 39 Md. App. 1, 392 A.2d 1081 (1978), as well as the Maryland authority and recent literature on the issues of psychological

factors and the 'psychological parent' relationship, *Montgomery County Department of Social Services v. Sanders,* 38 Md. App. 406, 412-23, 381 A.2d 1154 (1977); *Bernhardt v. Lutheran Social Services, Inc.,* 39 Md. App. 334, 341-44, 385 A.2d 1197 (1978), *and see,* e.g., J. Goldstein, A. Freud, A. J. Solnit; *Beyond the Best Interests of the Child* (1973).

The paramount question, however, has been and continues to be the overall best interests of the minor child involved. *Carter v. Carter,* 156 Md. 500, 144 A.2d 490 (1929); *Miller v. Miller,* 191 Md. 396, 407, 62 A.2d 293 (1948); *Raible v. Raible,* 242 Md. 586, 219 A.2d 777 (1966); and *Krebes v. Krebes,* 255 Md. 264, 257 A.2d 428 (1972). Much testimony and several exhibits were offered at the trials of this case on the custody situation. The Court has also had an opportunity to determine the demeanor of the parties, the respective quality and availability of care, attention, and homelife that will be afforded Evan and that is reasonably necessary for him at his particular age and circumstances. It is the Court's determination that the child should continue to reside with the mother, Katarina Avnet, subject to the visitation schedule indicated below.

The Court has been presented with the grave concern of Richard Avnet that a change in the custody situation would allow Mrs. Avnet to remove the child from the jurisdiction, perhaps even to Europe with her, resulting in a permanent termination of his visitation with the child. These concerns were, in fact, the cause of the first pleadings in this file which he instituted. Mrs. Avnet, however, denies any alleged plans to leave the state or the country and says that she is satisfied in her job. Though her parents had lived in New York at the start of this litigation, her mother is now deceased and her father is moving to Rockville to be closer to his daughter. Mrs. Avnet has a brother in California but professes no desire to permanently move there.

While joint custody has been permitted by the courts (See C.J.S. *Divorce* Sec. 308), it can often

become a difficult situation, since it in effect means that one parent cannot take any action with the child without the other parent's approval. Some of the difficulties with joint custody have been detailed in a recent article (See *Family Advocate,* American Bar Association, Summer (1978), and are present in this case as well. It would seem more beneficial to all parties to institute an arrangement of 'shared custody' in which greater flexibility would be afforded both parents, but limitations on taking action with the child still apply.

Therefore, it is the decision of this Court that custody of the minor child, Evan Avnet, will be shared according to the following arrangement:

1) The child is to reside with his mother, who shall not change her Maryland address without approval of the father, Richard Avnet, or upon proper petition to this Court: that is, this limitation applies only to relocation outside the State.

2) Every other weekend, as provided in the Separation Agreement, the child may visit with the father from the current schedule of Thursday evening to 6:30 P.M. on Sunday. During the week, the child is not to be removed from his daytime activities with his babysitter.

3) During the summer months, that is the traditional period from Memorial Day to Labor Day, the child may visit with the father for six weeks, during which time the wife is entitled to four weekends of visitation, with the same weekend schedule as that enjoyed by the father, as recited above.

4) In addition, the parties shall rotate, beginning with the wife, the visitation and custody of the child on the following holidays, which period shall begin at 6:30 P.M. of the previous day and end at 10 P.M. of the following evening.

STATE AND FEDERAL HOLIDAYS

New Year's Day
Lincoln's Birthday
Washington's Birthday
Good Friday
Memorial Day
Independence Day
Labor Day
Columbus Day
Veterans Day
Thanksgiving Day
Christmas Day

RELIGIOUS HOLIDAYS

Yom Kippur
Rosh Hashanna (1st day)
Purim
Simchat Torah
Passover (1st and 2nd days)
Hannakuh (1st day)

OTHER HOLIDAYS

Child's birthday
Halloween

5) PROVIDED, HOWEVER, that EVERY MOTHER'S DAY and MOTHER'S BIRTHDAY and EVERY FATHER'S DAY and FATHER'S BIRTHDAY, the child is to be with the mother or father respectively, *REGARDLESS* of the rotation of weekends, visitation, or legal or religious holidays.

After the child begins school, the visitation for weekends will begin at 6:30 P.M. on Friday instead of on Thursday, and the holiday rotation will be limited to those days for which school classes are suspended or permission from the school for absence is given. Further, once school begins the visitation schedule is to be followed with a paramount interest being that of the successful and rewarding completion of the child's school activities, including extracurricular interests.

7) Travel with the child by either the mother or father is limited to four nights successively with notice but not necessarily approval of the other parent. Over that time, travel with the child must be on approval of the parent or petition to this Court. All travel with the child for more than one night must be with notice to the parent, if outside the standard visitation schedule.

It is hoped that this schedule will be more compatible to the parties and will afford Evan a relationship with his parents free of tension and anxiety."

Judgment affirmed;
Costs to be paid by Appellant.

APPENDIX II

In the Court of Appeals of Maryland

Petition Docket No. 222

September Term, 1980

(No. 1207, September Term, 1979
Court of Special Appeals)

Richard J. Avnet

v.

Katarina Avnet

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: September 4, 1980.

APPENDIX III

SEPARATION AND PROPERTY SETTLEMENT AGREEMENT

THIS AGREEMENT made this 26th day of September, 1977 by and between RICHARD AVNET, hereinafter referred to as "Husband", and KATARINA AVNET, hereinafter referred to as "Wife".

W I T N E S S E T H:

WHEREAS, the parties hereto were married on the 12th day of October, 1969 in Flushing, New York and

WHEREAS, one child was born as a result of said marriage, namely, Evan Avnet, and

WHEREAS, in consequence of disputes and unhappy differences which have arisen between the parties hereto, the said parties have voluntarily and mutually agreed to live separate and apart.

NOW, THEREFORE, in consideration of mutual premises hereincontained and other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. The parties may at all times hereafter live separate and apart. Each shall be free from interference, authority, control, direct or indirect, by the other, as if sole and unmarried. Each may reside at such place or places as he or she may elect. Each may conduct and carry on any business, profession or employment as each may deem advisable. Each shall be at liberty to act and do as he or she sees fit and to conduct his or her personal life as freely and as fully as if he or she were sole and unmarried.

2. The parties shall not annoy, molest or otherwise interfere with each other, nor shall either of them compel or attempt to compel the other to cohabit with him or her by any means whatsoever.

3. The parties further agree that the execution of this agreement shall in no wise be considered or construed as a waiver or bar to any cause for divorce which either of the parties may now have against the other or which may hereafter accrue.

4. The parties hereto shall have the joint legal custody of the minor child, to wit, Evan Avnet. However, said child shall reside, on a regular basis, with the wife.

5. The Husband shall have the reasonable right of visitation to said child as follows:

a. Every other weekend from Friday evening at 6:30 p.m. to Sunday evening at 6:30 p.m. away from wife's home

b. Twice per week, but not overnight, each week

c. For one twenty-four hour period (overnight), provided, however, that Wife is notified for such period at least one week in advance thereof.

d. For a period of six weeks each summer, consecutive with husband & away from wife's home-in addition-

e. Every other school vacation, and holidays such as birthdays, Christmas, New Year's, Thanksgiving, Jewish Holidays, etc., and any other holidays that the parties may consider important and appropriate for visitation, & on such occasions, visitation shall be overnight.

f. For the Husband's six week visitation during the summers, the Wife shall be entitled to a reasonable right of visitation at least three days per week, but not regularly overnight.

6. The parties hereto agree that the minor child shall not be removed permanently from the State of Maryland or from the United States of America at any time. However, the parties may remove the child from the State or civil jurisdiction or country for short periods of time, such as for a vacation or holiday, provided the consent of the other party is first obtained, which consent shall not be unreasonably withheld. If the parties fail to agree, a court order shall be required.

7. Each of the parties hereto agree that they will attempt to engender in their minor child the love and respect of the other parent; they will attempt to rear their child in cooperation with one another; all important decisions related to the health, education and welfare of said child shall be made by mutual decision; that in all respects, and particularly with respect to visitation, the parties will conduct themselves in a manner consistent with the best interest and welfare of said minor child; neither party shall attempt to influence the minor child against the other party.

9a

APPENDIX IV

In The
Court of Appeals of Maryland

Miscellaneous Docket No.

September Term, 1980

Richard J. Avnet

v.

Katarina Avnet

PETITION FOR CERTIORARI TO REVIEW
THE DECISION OF THE COURT OF SPECIAL APPEALS

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by the father, if the same rule is employed as in a petition to change custody, namely a change of circumstances adverse to the welfare of the child. It is submitted that such should have been the standard utilized by the lower Court and by the Court of Special Appeals in the *Avnet* case. No such standard was applied.

The net effect of the modification of the Consent Decree is to attenuate the role of the father and to enlarge the role of the mother in the upbringing of the child. This was done even though the mother already had the child living with her. It is self-apparent that this will make a significant change in the relationship of father and son to the detriment of both.

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III. It is a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution to apply a different standard in modifying a father's custody rights as distinguished from the mother's custody rights.

In this case there is joint or shared custody. Visitation rights are a part and parcel of custody *Grubbs v. Dowse,* 226 Ga. 763, 177 S.E.2d 237; *Boyles v. Boyles,* 14 Ill. App. 3rd 602, 302 N.E.2d 199.

The standard applicable to a petition for a change of custody is an affirmative showing of change of circumstances which adversely affect the welfare of the child. *Vernon v. Vernon,* 30 Md. App. 564, 354 A.2d 222; *Sartoph v. Sartoph,* 31 Md. App. 58, 354 A.2d 467.

Basically, the father-appellant is seeking to preserve the ingredients of his shared custody rights, namely, the visitation privileges originally granted to him by the Separation Agreement and by the Consent Decree. Any diminution in these rights by a Court must be guided by law and that law dictates that the mother-appellee must have proved a substantial change in circumstances adverse to the child's welfare. The father-appellee would have had to prove such if be sought to deprive her of her custodial rights or a lessening of her custodial privileges. It was a denial of the equal protection of the laws guarantee to provide a different standard for the father-appellant than for the mother-appellee in the consideration of custodial or visitation rights.

Respectfully submitted

John H. Price, Jr.
222 E. Baltimore Street
Baltimore, MD 21202
Tel. #(301) 727-8454
Attorney for Appellant

I HEREBY CERTIFY that on this 3rd day of July, 1980 a copy of the aforegoing Petition for Certiorari to Review the Decision of the Court of Special Appeals was mailed to George P. Haldenman, Esquire, 22 West Jefferson Street, Suite 405, Rockville, Maryland 20850.

_____

John H. Price, Jr.